

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

HON. ROLAND J. STEINLE

CLERK OF THE COURT
A. Chee
Deputy

STATE OF ARIZONA

LACEY ALEXANDRA STOVER GARD
JASON BYARD EASTERDAY

v.

JOSHUA IDLEFONSO VILLALOBOS (001)

LAWRENCE S MATTHEW
ALICIA MARIE DOMINGUEZ

CAPITAL CASE MANAGER
VICTIM WITNESS DIV-AG-CCC

RULING

(POST-EVIDENTIARY HEARING /PCR MATTER/CAPITAL CASE)

After reviewing the post-conviction relief pleadings, the Court issued a ruling granting the defendant an evidentiary hearing as to four claims: two relating to guilt phase issues, Claim 1 (retention of pathologist/IAC trial counsel) and Claim 2 (lesser-included offense/IAC appellate counsel); and two relating to penalty phase issues, Claim 1 (erroneous records as basis of experts' opinions/IAC trial counsel) and Claim 5 (erroneous records disclosed to expert/IAC trial counsel). ME dated 8/20/2013.

The parties resolved penalty phase claims 1 and 5 by stipulation. Joint Memorandum and Stipulation to Vacate Death Sentence and Order a New Penalty Phase and Court Order dated 2/27/2014. In accordance with the parties' stipulation, the Court vacated the death sentence and granted defendant a new penalty phase trial. Order dated 2/28/2014.

The remaining guilt phase claims proceeded to Evidentiary Hearing on July 14 -15, 2014, The parties filed simultaneous closing briefs on September 19, 2014, followed by Oral Argument on December 10, 2014. The Court has reviewed the claims, the evidence, related portions of the record, and the arguments of counsel.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

In the two remaining claims, Defendant alleged that he was denied his 6th Amendment right to effective assistance of counsel, at trial and on appeal. In Guilt Phase Claim 1, defendant alleged ineffective assistance for trial counsel's failure to retain a pathologist; in Guilt Phase Claim 2, defendant alleged ineffective assistance of appellate counsel for failing to raise as an issue the trial court's denial of a lesser-included offense instruction.

***I. Guilt Phase Claim Claim 1:
IAC Trial Counsel -- Pathologist***

Defendant claims that trial counsel's¹ failure to hire a pathologist to challenge the State's evidence as presented by the medical examiner ("ME") and to assist with cross-examination of the ME constituted ineffective assistance. Specifically, defendant now claims that:

- i. At trial, a pathologist "would have flat-out contradicted Dr. Zhang's testimony, and revealed gaping flaws in Dr. Zhang's conclusions";
- ii. At trial, a pathologist "was critical to assist in an effective cross-examination of Dr. Zhang" about external bruises on the victim, aspiration pneumonia, and symptoms of chronic/longstanding trauma;" and
- iii. At trial, a pathologist "would have provided a definitive defense that someone other than defendant inflicted the fatal injury."

Supplemental Petition for Post-Conviction Relief at pp. 18-23.

¹ Trial counsel: The Office of the Legal Advocate (OLA), Ken Everett, was initially assigned, but withdrew on 2/17/2004; thereafter, The Office of Contract Counsel (OCC) appointed Dan Raynak as first chair counsel (Raynak withdrew 3/7/2007) and Rod Carter, 2nd chair; upon Raynak's withdrawal, Carter became first chair as of 3/8/2007 with Stephen Duncan as second chair. These dates are incorporated into the Case Timeline below:

1/3/2004 Homicide
1/13/2004 Notice of Supervening Indictment
2/13/2004 Notice of Intent to Seek the Death Penalty
2/17/2004 ME: OLA (Ken Everett) withdrawal granted
Thereafter, the Office of Contract Counsel (OCC) appointed **Dan Raynak** first chair and **Rod Carter** second chair
9/8/2005 State's Amended Notice of Intent to Seek the Death Penalty (NIDP)
3/7/2007 lead counsel **Raynak** withdrew
3/8/2007 **Carter** became first chair, with **Stephen Duncan** as second chair.
3/8/2008 – 4/14/2008 Trial [2/11/2008 – 3/26/2008 Guilt Phase (Verdict filed 3/31); 3/31/2008-4/1/2008 Aggravation Phase (Verdict filed 4/2); 4/2/2008-4/14/2008 Penalty Phase (Verdict 4/15)]

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

For the reasons stated below, the Court concludes that (i) a pathologist would have contradicted Dr. Zhang's testimony, in part; (ii) a pathologist could have been of assistance in cross-examination (but was not critical); and – most importantly – (iii) a pathologist would not have definitively established that “someone other than defendant inflicted the fatal injury.”

A. Background

After being left in the defendant's care, the four-year-old child/victim exhibited certain symptoms over the course of the evening and was pronounced dead when taken to the hospital the next morning. At trial it was established that the victim's mother worked from 4 pm to 1 am, with a lunch break around 8 pm. The defendant looked after the child and her younger half-sister during mother's work hours. The defendant admitted striking the victim with a closed fist during the early evening hours, at around 5 pm. The child did not eat during the evening lunch break. On the drive to pick up the mother after her shift, the defendant told a detective that the child was somewhat weak; that he was concerned that she was having difficulty breathing and pushed on her stomach; that the child vomited; that when mom asked about the smell he said that he was the one who had been sick; and that he carried the child from the car to the apartment and put her to bed. Medical testimony established that the child was in rigor by 7 or 8 am the next day and that the child likely died 5-8 hours earlier.

Based upon the Medical Examiner (“ME”), Dr. Zhang's, trial testimony, the State argued that the defendant struck the victim with a closed fist before her mother's dinner hour (rupturing/tearing her mesentery, which resulted in her eventual death), and then beat her sometime between the dinner break and her mother getting off work (resulting in substantial visible bruising). Dr. Zhang testified about medical evidence related to the closed fist injury; he also testified that the timing of certain bruising could be established “within a reasonable degree of medical certainty,” such that the additional injuries coincided with the post-dinner break time period when the defendant was essentially alone with the victim.

Defendant claims that but for Dr. Zhang's testimony, the jury would not have found him guilty of felony murder and of child abuse.

B. PCR EH Testimony

Witnesses with medical expertise who testified at the PCR Evidentiary Hearing included Dr. Trepeta and Dr. Ophoven on behalf of the defendant, and Dr. Keen on behalf of the State.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Dr. Richard Trepeta, M.D., has a specialty in pathology. PCR Exhibits 1, 2: CV, report. He did not review the reports of Dr. Ophoven or Dr. Keen; his report is the same as it would have been had he prepared a report for trial.

Dr. Trepeta recalled that he told Raynak "...basically what I told the initial two attorneys, that a great deal of the injuries in this case to the child were days to weeks to possibly months old and there were none that I could absolutely say were less than 24 hours. I could date some of the injuries to less than 48, but to say they were 24, 12, or 6 just wasn't possible and that a lot of the injuries, major injuries, which were in the inside the abdomen, they were all accompanied by changes which were clearly days to weeks old." RT 7/14/2014 at 8.

He testified that "[o]nly a video of the event would disclose whether the injury was less than four hours old:

Q: You cannot tell by the pathology, the medical science, that's been provided by the medical examiner?

A: No, especially because those injuries are all associated with changes that are days old. Somebody would have to reinjure exactly the same site that was reinjured days or weeks earlier and cause a new injury on top of that, but the appearance would be just the same as if that old injury showed evolution with additional hemorrhage. There's no way to say an additional injury was inflicted. There's no specific change that goes along with this is 4 hours or 6 hours or 8 hours.

RT 7/14/2014 at 15.

On cross-examination, he acknowledged that in his current report, Exhibit 2, he wrote, "After careful examination of these materials I concur with the findings described by Dr. Zhang." RT 7/14/2014 at 22-23. He specifically agreed with the finding that "a closed fist punch from an adult could have caused the fatal injury." RT 7/14/2014 at 23. He agreed "that an admission from a person admitting to punching [the child] in the abdomen the day before she was pronounced dead at the hospital could be useful in narrowing down the time frame of when an injury occurred[.]" RT 7/14/2014 at 25-26.

Redirect refocused on the medical evidence, from which the doctor could not confirm the presence of a new injury or narrow the time period. Dr. Trepeta does not disagree with Dr. Zhang's findings in the slides regarding the injuries and damage to the child's body, but disagrees with the interpretation of the significance of the information.

Dr. Janice Ophoven, is a forensic pathologist "with special training and [forty years of] experience in injuries in children." RT 7/14/2014 at 34. PCR Exhibits 6, 7 and 8: CV, preliminary report affidavit. In connection with the ME's findings, she stated that, "...When I was referencing my difference of opinion with Dr. Zhang I was specifically referencing my

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

difference of opinion regarding the age or the injuries that he was discussing of the organs inside the body...” RT 7/14/2014 at 36.

When asked about the cause of the victim’s death, Dr. Ophoven opined, “[She] died from complications of blunt force trauma to the abdomen.” RT 7/14/2014 at 37. “[When we talk about complications, w]e talk about long-term damage to the liver, to the back of the abdomen, to the pancreas, to the colon specifically, that resulted in inflammation and eventually disruption of the integrity of the colon with leakage of material such that she collapsed and went into shock and died. [And to a reasonable degree of medical certainty, t]he fatal injury that caused this damage occurred weeks prior to the cardiac arrest and death.” RT 7/14/2014 at 37-38.

Dr. Ophoven saw no evidence of a new intentional inflicted injury within 24 hours of the child’s death, such as evidence of fresh bleeding, fresh tear, fresh tissue damage that’s separate from the old injury. RT 7/14/2014 at 46. Rather, the child “...had an injury and in essence was on track to death if she didn’t get proper treatment and intervention.” 7/14/2014 at 60.

Specifically, the doctor stated:

Q: Is there any evidence that that hit [by defendant] caused the fatal injury in this case?

A: No, I don’t have evidence that there was a fatal injury that resulted in her deterioration on that day.

RT 7/14/2014 at 66.

However, on cross-examination, Dr. Ophoven agreed that:

Q: Setting aside questions of timing, is it your opinion that a single blow from an adult, a close fistful blow could have caused these injuries to [the victim]?

A: Yes....I’m not saying it was a single blow. I’m saying it could have been.

RT 7/14/2014 at 70.

Dr. Ophoven cautioned that “two different agendas got in the way of the facts.” RT 7/14/2014 at 77-78. The Court believes that she was referring to the competing agenda of the defendant and the co-defendant, each attempting to diminish his/her responsibility for the child’s death. The doctor identified how her expertise might have assisted trial counsel in its pretrial preparation and at trial. RT 7/14/2014 at 64-67.

Dr. Philip Keen is a self-employed forensic pathology consultant. Resume at Exhibit 43. He has testified many times as an expert in pathology and, in this case, reviewed the materials listed in Exhibit 45. This included Dr. Zhang’s report and work. Because he hired Dr. Zhang, he is familiar with Dr. Zhang’s background, which included a residency in pediatric pathology. In connection with this case, Dr. Keen wrote a letter summarizing his work and drafted a report. PCR Exhibits 21 (letter date 5/9/2014) and 44.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Dr. Keen discussed the half-life of a neutrophil, and how knowing the half-life provided assistance establishing the time of injury. RT 7/14/2014 at 113. (“...But half life of a neutrophil is thought to be about twelve and a half hours...if you actually label the cells and you measure the full life span of the cell while it’s in the bone marrow before it’s circulating blood, before it’s to the site of the inflammation and the time at the inflammation, it’s probably a little bit longer than that and may actually go up to five point four days as a half-life. We’re not measuring the birth of the cell. We’re measuring the action of the cell because we’re looking at a cell at the site where it’s doing its work. I have for years used approximately twelve hours as the point where we begin to see some break-up of the nucleus.”).

He agreed with Dr. Zhang’s findings differing only in some of the wording regarding injury patterns. RT 7/14/2014 at 115-116; *see* Exhibit 47 (full ME’s file and autopsy report). He and Dr. Zhang differ from Dr. Ophoven; they identified a “semi-patterned contusion, meaning that they are mimicking the object that impacts the abdomen. It is consistent with that which you would expect to see from a doubled up fist striking the abdominal wall at least once, possibly twice.” RT 7/14/2014 at 118; *see* Exhibits 61 and 62. Dr. Keen placed the time of injury at less than 72 hours, and the closest time as less than 48 hours.

Dr. Keen identified internal injuries. The “...extra peritoneal hemorrhage, where the whole body is encircled with a dissecting hemorrhage around the lining of the peritoneal and the lining of the abdominal activity...” consisted of clotted and unclotted blood. The unclotted blood appeared more consistent with fresh than with dissolved clots, and “is probably less than about 12 hours prior to death.” RT 7/14/2014 at 121-122. The source, over time, was the tearing of a ligament in the liver and a tear in the mesentery. RT 7/14/2014 at 122. He identified other injuries that were older: to the child’s lungs, 3 days; rib fracture, broken in the past and healing; and bruising that occurred over period of time.

Dr. Keen addressed and discounted Dr. Ophoven’s hypotheses of alternative causes of death: the absence of indicators of active bacterial infection (RT 7/14/2014 at 137-138); dehydration (some), malnutrition (probably not) (RT 7/14/2014 at 138-140); aspiration pneumonia (RT 7/14/2014 at 140-141); discounted disseminated intravascular coagulopathy (DIC) based on bleeding pattern and inability to test postmortem (RT 7/14/2014 at 141-144); and the color of the child’s blood indicated fresh bleed (RT 7/14/2014 at 144-146).

On cross-examination, Dr. Keen agreed that he had not included in his report that his estimate of the time interval between injury and death at twelve hours was also based on blood loss and tissue changes at the injury sites. “You can only go so far with the blood loss and you can only go so far with the tissue changes. I’m trying to take all of them into account...” RT 7/14/2014 at 147.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Dr. Keen agreed that his 12 hour time period differed from Dr. Zhang's estimate of "less than four hours." RT 7/14/2014 at 155-156. He agreed that as to external bruising his timeframes were longer than Dr. Zhang's (e.g., A-less than a day/4-72 hours vs. less than 4 hours; B-72 hours or older vs. 4 hours; C-3 days or more vs. less than 4 hours; D- 12-18 hours vs. less than 12 hours; E-several days vs. less than 4 hours). At 156-160. Dr. Keen agreed with what Dr. Zhang found in the slides but not his conclusions for what he saw on the slides as to "those particular bruises." RT 7/14/2014 at 160.

Dr. Keen was firm in his opinion about the cause of death: "She doesn't have another cause of death. This child has some cerebral edema. She has the aspiration changes, but has this bleeding injury is what's causing her death. It seems pretty obvious." RT 7/14/2014 at 169. Critical to his opinion of the time of the injury was the child's refusal to eat at the 8:00 lunch hour; her lack of appetite that morning might "bump [the] timeline back a little bit..." but remained "within my 12 hour time frame." RT 7/14/2014 at 176; 181-182.

As did Dr. Ophoven, Dr. Keen agreed that generally attorneys may not be aware of the medical aspects of a case, and that he can provide medical expertise to help attorneys understand a case and prepare for trial. RT 7/14/2014 at 176.

On redirect, Dr. Keen stated that he was unable to determine whether there were two separate events to the liver. The mesentery, however, "...probably is more than one event because it has reparative changes. The child did not survive, in my opinion, long enough to repair this episode to the extent it's repairing the mesentery following a repetitive injury." RT 7/14/2014 at 180. In his opinion, neither aspiration pneumonia nor terminal obstruction with aspiration led to her death; nor did pneumonia.

Witnesses at the evidentiary hearing also included trial counsel Daniel Raynak, Rodrick Carter, and Stephen Duncan.

Daniel Raynak, a criminal attorney who began practicing in 1985, acted as lead counsel upon withdrawal of the Legal Advocate in February 2004. Raynak was lead counsel from almost the beginning of the case in 2004 through March 2007. ME 2/17/2004; *see* ME 3/3/2004 (identifies Raynak and Carter as counsel for defendant, notwithstanding the lack of either an entry of appearance or a formal appointment in iCIS).

Raynak initiated a request for an independent pathologist (1) to determine the cause of death and (2) to determine the existence of previous injuries. See PCR Exhibits 25, 26: expenditure request; letter; both dated 6/28/2004. Although he secured funding for expert services, correspondence suggests that the expert, Dr. Trepeta, was awaiting additional

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

information from counsel and that Dr. Trepeta never provided counsel with a written report of his findings and conclusions.

Raynak's practice would have been to discuss Dr. Trepeta and the reasons for retaining him – as well as the preparation of the report – with co-counsel, Rod Carter. RT 7/15/2015 at 10. Raynak had no recollection of “telling Mr. Carter that Dr. Trepeta would not be helpful to the case,” and would have had no reason to make such a statement. RT 7/15/2014 at 13-14.

Raynak testified that the defendant's admission to striking the child did not eliminate the defense need for a pathologist because of (1) the defendant's age; (2) his education; (3) the lengthy questioning by law enforcement that was arguably coercive; and (4) the defendant's admission did not mean that “that was the blow that caused the death of the child.” RT 7/15/2014 at 11-12.

On cross-examination, Raynak acknowledged that he believed that a plea agreement was in his client's best interest because defendant “fully confessed to the crime.” During the PCR hearing, Raynak denied that defendant had made a “full confession” until the State confronted him with a previous interview [Exhibit 92 at 7, lines 4-5] in which he stated, “...our client had fully confessed to the crime, so our hope was to try to resolve the case...To me that was very damning evidence”:

Q: The fact that [defendant] admitted to striking the child was damning evidence?

A: Absolutely.

RT 7/15/2014 at 17-18.

Thereafter, Mr. Raynak was asked to concede that the child “...died from the injuries that [defendant] admitted to causing.” Raynak initially acknowledged only that “she died from injuries.” However, when confronted with the earlier interview he revised his statement to “...the child died from the *injury* that my client admitted to...causing the *injury*...My recollection is one blow to the stomach...” RT 7/15/2014 at 18-19 [*injury* rather than “injuries”]; see Exhibit 92 at 7, lines 16-19.

He believes that “I may have received some information potentially from co-defendant's counsel that they had hired someone, and I don't think they were going to use him. So I thought it might be helpful to us because they didn't want to use him...but I'm not 100 percent certain on that.” RT 7/15/2014 at 23.

On redirect, he emphatically stated that “...I had talked to Dr. Trepeta, and he was certainly going to be useful for the defense. That's why I kept on pushing to get the report.” RT 7/15/2014 at 25.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Rod Carter, appointed by the Office of Contract Counsel, acted as second chair from March 2004- March 2007, when he took the lead chair upon Raynak's withdrawal. See PCR Exhibit 95: billing statements. This was his first capital case. He was lead counsel from March 2007, through the trial that lasted from March 8 through April 14, 2008.

Carter does not recall ever talking with Dr. Trepeta. RT 7/15/2014 at 37. He does recall talking with "Mr. Raynak or someone [maybe the co-defendant's attorney, Chad Shell]...I thought it was Dan [Raynak]...My recollection is that Dr. Trepeta would not be beneficial to [defendant]...I believed it wasn't going to be beneficial to [defendant] so I didn't pursue." RT 7/15/2014 at 38-40.

He had no reason, other than the conversations, for not retaining a pathologist: he had not received medical training, and he had no strategic reason for not consulting or retaining a pathologist. RT 7/15/2014 at 40. He had twin strategies of implicating someone other than defendant as the person who inflicted the fatal blow and seeking a lesser included jury instruction on child abuse to avoid child abuse as a predicate felony. He agreed "that a pathologist may have been able to determine if the [defendant] punched [the child] on the night in question and whether or not that would have been a fatal blow." RT 7/15/2014 at 42-43.

On cross-examination Carter agreed that defendant's confession was not helpful to the defendant's case, and that arguing "recklessness" permitted the defense to incorporate the admission into the defense. In building his strategy, Carter relied on someone's statement that "Dr. Trepeta was not going to be helpful [to the defense]." RT 7/15/2014 at 43-44. Carter agreed that he and Raynak pursued a plea agreement "because the chances of prevailing at trial were slim," and that all the statements made by defendant were "very damaging," including that the defendant was with the little girl so the police would think it was the defendant who had injured her. RT 7/15/2014 at 45.

Carter agreed that during trial he attempted to highlight inconsistencies in Dr. Zhang's opinion, and to show that the ME had changed his testimony from a longer period to a shorter period "where defendant may not have been the only person who had contact with the little girl..." RT 7/15/2014 at 46.

On redirect Carter agreed that he could highlight changes in Dr. Zhang's testimony but could not delve into the reasons for the change. RT 7/15/2014 at 47. Nor did he have information about the "fatal injury possibly being inflicted days or even weeks prior to the date that the State claimed it took place." RT 7/15/2014 at 48.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Stephen Duncan was appointed to serve as second chair, upon Carter's appointment as first chair in March 2007. Although he had experience in child death cases, this was his first capital case.

Duncan had no independent recollection of the strategy of the case. His review of a pleading requesting a lesser-included instruction suggested to him that one defense was "to seek a lesser-included offense for the child abuse. His review of a January 15, 2014 interview (page 8, lines 2-5) refreshed his memory that a second defense "was the dating of the bruising...and whether or not our client was present with her at the time." RT 7/15/2014 at 65-66. He had no recollection about discussions with Carter about retaining a pathologist nor any recollection about a strategic reason for not using a pathologist. RT 7/15/2014 at 68.

On cross-examination Duncan agreed that he would have reviewed all the material at the time, to help discuss general strategies with Carter. He does not recall the substance of any of the strategy conversations. RT 7/15/2014 at 69.

The final witness at the evidentiary hearing was **Natman Schaye**, who opined on the reasonableness of trial counsel's assistance in light of prevailing professional norms in the community. Schaye serves as Senior Trial Counsel for the Arizona Capital Representation Project, and has represented death penalty clients since 1984. Over the State's objection, he offered testimony as an IAC "*Strickland*" expert on behalf of the defendant. The Court notes that, although Schaye has extensive capital representation experience, his actual trial experience is limited. Nonetheless, the Court found his testimony to be of assistance.

Schaye testified that particularly in a capital case a number of experts may be necessary. At the guilt phase, it is "necessary to consult with experts in that field, unless by some chance there is somebody on the defense team who has that expertise...in almost every case it's necessary to look outside to consult with an expert and to determine the accuracy of the State's evidence and whether retaining an expert to challenge, and potentially testify, is appropriate." RT 7/15/2014 at 78-79. Based on his review of the materials and observation of PCR EH testimony, Schaye addressed the performance of defense counsel individually:

(Daniel Raynak) "Raynak's acts fell below the prevailing professional norms with regard to failing to retain a pathologist. Raynak retained a pathologist, apparently, Dr. Trepeta, but he failed to follow up. There was a two-year period where he, apparently, knew what Dr. Trepeta's opinion was, or at least to some extent what his opinion was, and that it would be favorable, but he failed to follow through, meet with Trepeta, obtain a report specifically regarding the case.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

“... all Mr. Raynak had was a general idea of what Dr. Trepeta would say and that it would be helpful to (defendant]. And, clearly, from my review of the materials, it would have been helpful...”

“But he, Mr. Raynak, didn’t follow through. Didn’t develop evidence that would have been useful in attempting to settle the case or in preparing for trial.”

RT 7/15/2014 at 80.

(*Rodrick Carter*) “Mr. Carter, by his own admission, completely dropped the ball and didn’t follow up with Dr. Trepeta...and it is an odd situation where second chair moves to first chair. It certainly would have been appropriate for him to seek a new expert [or] to follow up with Dr. Trepeta, but he didn’t do either.

“...some cases there are many possible [nuances]. There is just no question in this case that a strong medical expert was extremely important and that would be obvious to anybody taking any kind of look at the case...”

“...And you know this is evidenced, in part, by the fact that Mr. Carter interviewed Dr. - I’m sorry, the State’s medical expert after the trial started....

“...His openings and closings make it clear that he wanted to pursue the timing and pursue recklessness as opposed to intent as his defenses, but he didn’t have his own expert either to testify or to assist him in cross-examining the State’s expert.”

RT 7/15/2014 at 80-81.

On redirect, Schaye testified that Chad Shell’s knowledge does not aid Carter at time of trial. Somebody else’s interview of Dr. Zhang might be helpful, but falls short of what a reasonable lawyer would have done. Nor is it of assistance if Dr. Zhang’s opinion changes between the time of the first interview and the time of the trial.

RT 7/15/2014 at 92.

(*Stephen Duncan*) “...Mr. Duncan fell into the same sort of not doing anything with regard to Dr. Trepeta or another medical examiner in just not preparing.”

RT 7/15/2014 at 81.

On cross-examination Schaye acknowledged that he has represented one capital defendant through trial and sentencing. RT 7/15/2014 at 90. Although this suggests to the Court a lack of familiarity with what may occur during the “heat of trial,” the issue in this case relates primarily to pretrial decision-making.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

C. Ineffective assistance of counsel during the guilt phase of the trial

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel at trial. Defendant alleges that his appointed counsel provided ineffective assistance.

1. Strickland's "Deficient Performance" Prong

To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Deficient performance is established when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In determining deficiency, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. This presumption of reasonableness means that not only does the court "give the attorneys the benefit of the doubt," it must also "affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011).

Our Arizona Supreme Court has adopted the *Strickland* test, stating:

To determine whether [defense] counsel was ineffective, a two-pronged test is applied: 1) was counsel's performance deficient? *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689 (1985); and 2) was defendant prejudiced by his attorney's deficient performance? *State v. Lee*, 142 Ariz. 210, 213-14, 689 P.2d 153, 156-57 (1984). This test complies with the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

State v. Fisher, 152 Ariz. 116, 118, 730 P.2d 825, 827 (1986).

First, defendant must show that trial counsel's performance fell below an objective standard of reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. In evaluating trial counsel's conduct, we consider all circumstances, with a strong presumption that the conduct falls within a wide range of reasonable professional assistance. *Id.*

Second,

State v. Valdez, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

The defendant has the burden of proving his allegations by a preponderance of the evidence. Rule 32.8(c), Arizona Rules of Criminal Procedure.

Trial counsels' failure to secure the assistance of his requested, and funded, expert and a written report constituted deficient performance.

Counsel is entitled to a presumption that the calling, or not calling, a witness is within the realm of strategic decisions. However, counsels' collective PCR testimony and the evidence adduced at the PCR hearing successfully refuted this presumption. Counsel denied that they had made a strategic decision not to hire, pursue a report from, or consult with a pathologist to address and challenge the MEs conclusions. Counsels' files disclosed no evidence that they had made a reasonable investigation in support of any strategic decision.

Based on PCR evidence in this case, the Court finds the following facts and concludes that the facts support its determination that at the pretrial stage, each attorney's conduct was deficient and the team's performance, cumulatively, was deficient:

Early in the case, attorney Daniel Raynak ("Raynak") obtained funding for an expert on the issues of cause of death and timing of the injuries. Two years later, Raynak and the team had not received a report and the defense was mired in a squabble with the expert on whether the expert had actually received the necessary document. This is critical because the linchpin of the defense was weakening the opinion of the medical examiner. Without a report, little could happen – and little happened in fact. After two years Raynak withdrew and Rod Carter ("Carter") was elevated to first chair.

It is important to note that Raynak testified that, before the defendant's trial, he had never handled a child death; neither had Carter. Neither had any experience or expertise in child abuse/death cases. Both lawyers admit that under those circumstances it was necessary to consult with an expert in order to adequately prepare for trial. Supporting the attorneys' PCR testimony, the expert testified that he could have assisted the lawyers at trial in understanding the medical testimony preparing for trial, framing questions for the State's ME, and testifying on behalf of the defendant.

It is also important to note that Raynak claims to have briefed the team about the doctor's opinions. Carter sent a letter indicating he was waiting for the report of the expert and would disclose the report when he received it. This letter underscores the fact that Carter knew of the expert's involvement and the lack of a report. In March of 2007, upon Raynak's withdrawal, Carter was appointed lead counsel and did absolutely nothing to follow up with the expert who reportedly had been retained. Carter neither consulted with the expert nor even called to talk with him.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

In March of 2008, in the interval between jury selection and opening statements, Carter conducted an interview with the medical examiner, Dr. Zhang. During the interview, Carter discovered that Dr. Zhang had compressed the time line during which injury had occurred from 12 hours to 4 hours. The time-compression placed responsibility for the injuries squarely on the defendant, who was the only adult present during the now-compressed timeframe. There is no explanation why Carter waited until after jury selection to interview the linchpin of the State's case.

Stephen Duncan ("Duncan") testified that he came onto the case three years after it began and a year before trial and there was nothing to do. He testified he did a comprehensive review of the case file yet was completely unaware of the problems with the expert and the lack of any report.

In conclusion, after 4 years of pretrial preparation, and 3 ½ years after initially retaining the expert, the lawyers had no written report and had had only a few brief conversations with their expert. No lawyer offered a tactical or strategic reason for not following through. Overall, the lawyers' testimony was vague, inconsistent and at times contradictory. None proffered any memorandum to the file in support of their actions or decisions, but relied, instead, on cover correspondence.

Trial counsel Raynak may have made a strategic decision regarding Dr. Trepeta, but that conclusion was not supported by evidence adduced at the Evidentiary Hearing.

Successor counsel Carter recalled that Raynak (he thought; and/or co-defendant's counsel, Chad Shell, who did not testify at the PCR hearing), indicated that the expert testimony of Dr. Trepeta would not be helpful to the defendant. Had Raynak, as lead counsel, made a strategic decision regarding the expert, it would have been reasonable for successor counsel to rely on Raynak's conclusion; the trial court settlement judge identified Raynak as among the most experienced criminal defense counsel, along with Carter and Storrs who had also evaluated case.

The Court finds that it would have been reasonable for successor counsel, Carter, to rely on Raynak's verbalizations, had Raynak made a strategic decision regarding the expert; thereafter, Carter's interview of Dr. Zhang and discovery of the compressed timeframe, his cross-examination of Dr. Zhang, his use of Dr. Zhang's previous deposition for impeachment, and his closing in which he emphasizes the discrepancies, could have supported a finding of effective assistance and would have supported the conclusion that Carter's performance was not deficient.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

However, at the 2014 PCR hearing, Raynak emphatically denied making such a statement (that the expert “would not be helpful”), or ever reaching such a conclusion, and also denied that he made a strategic decision not to call an expert.

Notwithstanding his denials, however, certain of Raynak’s actions and statements between 2005-2007 indicate that – despite his 2014 testimony – Raynak may have made a strategic decision, and was skirting the issue for strategic reasons at trial in 2004-2007 (such as, to keep the State off-balance before trial; to keep the State from preparing rebuttal to any expert the defense called; to keep from having to disclose what may have been an inculpatory report to the State) and at the PCR in 2014 (perhaps to avoid the death penalty).

Those actions suggesting Raynak made a strategic decision at trial include:

In January 2005 Raynak deferred to co-defendant’s counsel, Chad Shell, to handle a hearing involving the expert (Dr. Trepeta) at which Shell clarified the key determination to be made by the expert, “...If I told you the issue in this case is the age of the injuries...” Later in the same hearing, Raynak himself represented to the trial court that were his expert, Dr. Trepeta, to agree with the opinion of the medical examiner, the defense would have to “cut a deal.” PCR Response, Exhibit I: RT 1/14/2005 at 19, 33.

Six months later, in June 2005, Raynak represented to the trial court that he would contact the defendant’s attorney to see if he could provide his expert’s [Dr. Trepeta’s] opinion, “to see if we needed [a medical expert] or not.” PCR Response, Exhibit K: RT 6/17/2005 at 4.

And then, nine months later at a settlement conference held on March 23, 2006, Raynak strenuously pressed his client’s family, and his client, to accept a plea (“cut a deal”) that would have taken the death penalty off the table.

In support of a resolution, the settlement judge, Criminal Presiding Judge O’Toole, emphasized that Raynak was among the most experienced counsel, as were Carter and Storrs, and concurred in the ME’s assessment of the defendant’s culpability and Raynak’s belief in the likelihood of defendant’s being convicted based on the evidence.

Additionally, the State, which presumably assessed the relative culpability of both the defendant and the co-defendant in light of the ME’s and Dr. Trepeta’s opinions, offered a plea to the co-defendant (before the timeframe became compressed) suggests that the State’s evaluation of the relative culpability supports a conclusion that expert opinion would not have been helpful. The prosecutor did not testify at the PCR hearing.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Also suggesting the strategic nature of the decision not to secure a written report (despite Raynak's claim to various judges that his expert was being recalcitrant and that counsel was actively seeking a report), was Raynak's action in August 2006 in vacating an OSC hearing set by the case management judge, Judge Steinle. Although the judge ordered the defense expert, Dr. Trepeta, either to provide a written report by August 28, 2006 or to appear on that date for a deposition, the expert did not author a report, and Raynak himself reportedly vacated the OSC having neither secured a report nor conducted a deposition:

On August 9, 2006 Raynak again complained, "...and I still haven't gotten his report. And I don't know what else to do other than if the Court wants to enter an order that he produce the report..." The State concurred in the request to "...have this Court assist with orders so we can get Dr. Trepeta to do his work so that the State can firm up any rebuttal evidence as well." Raynak indicated that was "fine with the defense," representing that "I've talked to him several times." PCR Response, Exhibit T: 8/9/2006 at 7, 9, 12.

"As a result, the Court ordered that Dr. Trepeta submit a report and/or a copy of his entire case file to Defendant's counsel on or before August 28, 2006. The Court further ordered that if Dr. Trepeta were to fail to do so, an Order to Show Cause or deposition regarding Dr. Trepeta would be held on August 28, 2006. The Court thereby attempted to facilitate the production of a report from Dr. Trepeta...No hearing was held on that date; State's counsel was later advised that the hearing was vacated upon the request of Defendant's counsel as the hearing was no longer needed...." See State's Response filed 12/8/2006, to [Defendant's] Motion to Continue filed 11/17/2006.

Thereafter, having failed to take advantage of the opportunity afforded by the then-vacated OSC, Raynak continued to complain that his expert had not filed a report.

Two months after vacating the OSC hearing, in October 2006, Raynak represented to the case management judge that he had "talked to the [expert, Dr. Trepeta] multiple times, personally wrote him multiple letters..." and blamed Dr. Trepeta for failing to write a report; "...his excuse was he had put away the notes and didn't have the coroner's report and never made a request for it and that was supposedly why he, you know...". Exhibit U: RT 10/23/2006 at 3-4. Addressing the ongoing defense claim that the expert had not provided a report, the State observed, "In regard to Dr. Trepeta, he was originally obtained by co-defendant's counsel and gave an opinion to co-defendant's counsel. And that was strictly inculpatory to counsel. I noticed Mr. Raynak spoke to that counsel in the hallway, so he said he would be forced to testify against this defendant

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

should that occur...So the issue regarding Dr. Trepeta is not one that is a matter only of not having a report.” Raynak protested that “He said something opposite. It’s exculpatory.” Thereafter, the court observed that the lack of a report might suggest that “...he’s telling both sides what they want to hear and doesn’t want to commit to either side...” Exhibit U: RT 10/23/2006 at 7-8.

In his November 2006 Motion to Continue the trial, put before the newly-assigned trial judge, counsel continued to insist, “Defense counsel never received a reply back from the forensic expert regarding evaluation of the age of the bruising and thus needs to obtain a new expert. This particular expert promised a report for several months, then later claimed he could no longer put together a report for lack of information. The expert then failed to compile a report if he was provided with the needed information...” Motion to Continue, filed 11/17/2006.

In December 2006 the State observed that “...defense now seems to be in a situation where they are going to have to select a new expert. We need to see whether we need to do rebuttal...Dr. Trepeta has been very problematic.” And, despite his claimed need for an expert, Raynak in January affirms that the defense had listed no experts in the guilt phase and emphasized, “We never listed experts in the guilt phase.” Oral Argument on State’s Motion for Sanctions, 1/12/2007.

In his March 2007 Motion to Withdraw, Raynak assessed his case, emphasized the strength of the State’s case and stated that the defendant “...needs a new attorney to review all aspects of this case and then give the Defendant his or her perspective, possibly saving the Defendant from a sentence of death.” Motion to Withdraw, filed 3/1/2007.

And in June of 2008, after defendant’s trial concluded, in a Sentencing Memorandum filed in the co-defendant’s case codefendant’s attorney Chad Shell summed up his understanding of Dr. Trepeta’s report and represented:

“Prior to interviewing Dr. Zhang, defense counsel retained Dr. Richard Trepeta to review the evidence and give opinions. Dr. Trepeta told counsel that there were 3 events causing the injuries to Ashley. First, there was an injury to Ashley’s liver that occurred approximately one week prior to her death. Second, there was bruising on Ashley’s back and upper buttocks that occurred approximately 3 days before her death. Dr. Trepeta stated this injury could have been caused accidentally. Finally, the rest of the injuries occurred within 6 to 24 hours of her death...”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Sentencing Memoranda and Correspondence 6/11/2008 at 4.

The latter conclusion, that the injuries were within 24 hours of her death, and perhaps as few as 6, comports with Dr. Keen's PCR testimony; the defense PCR experts agreed on the 24-hour timeframe, agreed it was "possible" that injury occurred within a shorter timeframe, but found a lack of medical evidence supporting that conclusion.

In contrast, PCR testimony undermined the presumption of strategy and established that Raynak initially secured authorization and funding for an expert, and then had little or no subsequent contact with the expert, failed to provide materials requested by the expert, and made no strategic decision regarding the expert; Raynak simply failed to follow through. Further, the documents produced at the PCR hearing supported this conclusion. The fact that neither Raynak nor the State proffered notes, contemporaneous memos to the file, witnesses, or other evidence; undercut the presumption that Raynak made a strategic decision.

For the reasons stated in its ruling, the Court finds that trial counsel Raynak's performance was deficient. Thus, the reliance of successor counsel on Raynak's actions was not reasonable.

The Court finds that trial counsels' failure to utilize the assistance of a requested and funded expert, to assist pretrial and at trial, and their failure to secure a written report from the expert, constituted deficient performance. The Court makes this finding specifically with respect to the actions trial counsel collectively: Mr. Raynak, Mr. Carter, and Mr. Duncan.

2. Strickland's "Prejudice" Prong

In addition to showing deficient performance, a defendant must also establish prejudice. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this standard, the court asks "whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 792 (2011) (quoting *Strickland*, 466 U.S. at 696). That is, only when "[t]he likelihood of a different result [is] substantial, not just conceivable," *id.*, has the defendant met *Strickland*'s demand that defense errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 787-88 (quoting *Strickland*, 466 U.S. at 687). "The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt...." *Strickland*, 466 U.S. at 695.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Arizona, too, recognizes the need to satisfy the second prong of *Strickland*, and requires:

....Second, trial counsel's performance must have prejudiced defendant's case. *Id.* at 692, 104 S.Ct. at 2067. Defendant must show that, *but for trial counsel's error*, there is a "reasonable probability" that the result would have been different. *Id.* at 694, 104 S.Ct. at 2068. Reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id.* When a defendant challenges a conviction, the inquiry is whether, absent the errors, there is a "reasonable probability that ... the fact finder would have had reasonable doubt [as to] defendant's guilt." *Id.* at 695, 104 S.Ct. at 2068–69.

State v. Valdez, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991).

In only a few cases can it be said that counsel did an absolutely perfect job at trial. In most cases, one could find something that counsel could have done better. The fact that counsel might have performed better at trial does not rise to adverse effect. The negative impact must be substantial although it need not have caused defendant's conviction. Whether an adverse effect has had a substantially negative impact must be determined on a case by case basis.

State v. Jenkins, 148 Ariz. 463, 467, 715 P.2d 716, 720 (1986).

The defendant's IAC claim hinges on the Court's analysis of the second prong of *Strickland*, whether the defendant suffered prejudice as a result of counsels' deficient performance. The defendant bears the burden of proving the allegations of fact by clear and convincing evidence Rule 32.8(c), Arizona Rules of Criminal Procedure. *Strickland* elaborates:

Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069 (1984).

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland v. Washington, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2066-67 (1984).

Although PCR counsel made a compelling argument that evidence presented (or not presented), and factual determinations made, during the guilt phase may mitigate in favor of leniency, and thus prejudice occurred, the Court is not persuaded. The Court notes that the defendant has been granted a new sentencing hearing; other than the prohibition against presenting "residual doubt evidence," at the resentencing the defendant will be permitted to present mitigating circumstances, which include "... any aspect of the defendant's character, propensities or record and any of the circumstances of the offense.." including those enumerated. A.R.S. § 13-751(G).

Defendant did not demonstrate a "reasonable probability" that the factfinder would have had a reasonable doubt respecting guilt.

At trial, the prosecutor argued that, based on Dr. Zhang's timing of the bruising and the defendant's admission to hitting the child, two incidents occurred: the first before the 8 pm lunch, by defendant striking the child with a closed fist; the second, after the 8 pm lunch, a beating administered by the defendant. Other than the victim and her younger half-sister, the defendant was the only one present.

Expert testimony could have eliminated the State's theory that – based on Dr. Zhang's timing of the injuries – two incidents occurred that evening: a closed fist injury and then a beating. Expanding the timeframe during which the injuries occurred could also have served to implicate another, the child's mother, in contributing to the bruising found on the child. Nonetheless, all of the PCR experts conceded that a closed fist injury would have been sufficient to cause the death of the child.

PCR Testimony demonstrated that the testifying experts do not necessarily dispute Dr. Zhang's findings; what the experts, Dr. Trepeta, Dr. Ophoven and even the State's expert, Dr. Keen, disagree on is the interpretation of those findings. At trial Dr. Zhang determined that much of the bruising, and the mesentery injury, occurred within 4-6 hours of the victim's death. With rigor at 8 am, and death likely occurring 5-8 hours earlier (between midnight and 3 am), the estimated time of injury would be between 6 and 11 pm - squarely within the timeframe that only the defendant could be the perpetrator, as the mother/codefendant was at work. The defense PCR experts, Dr. Trepeta and Dr. Ophoven, caution that 24 hours is the closest that the timing of the injuries can be established, expanding the time period to include an entire additional day.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

The State's PCR expert, Dr. Keen, relied on the presence of neutrophils coupled with his experience observing the half-life of a neutrophil, approximately twelve hours, to establish that the fatal injury to the mesentery occurred "probably less than twelve hours prior to death." PCR RT 7/14/2014 at 121-122. The twelve hour estimate, between time of injury and death, was further based on blood loss and tissue changes at the injury sites. PCR RT 7/14/2014 at 147 ("You can only go so far with blood loss and you can only go so far with tissue changes. I'm trying to take all of them into account..."). This opinion places the time of injury (less than 12 hours before the midnight to 3 am time of death) at the earliest between noon and 3 pm.

The PCR experts focused on the timing of the injury. Dr. Keen, the State's sole expert, opined that an abdominal injury occurred within 48-72 hours of the child's death. Dr. Ophoven found no "... evidence that there was a fatal injury that resulted in her deterioration on that day." PCR RT 7/14/2014 at 70. Dr. Trepeta acknowledged the absence of medical evidence "to narrow the time period to less than 48 hours." PCR TR 7/14/2014 at 15. Dr. Trepeta conceded that "only a video of the event would disclose whether the injury was less than four hours old." PCR RT 7/14/2014 at 15.

Defendant's admission to hitting the child with a closed fist in the early evening hours while mother was at work provides assistance with the timing. All of the PCR experts were directed to defendant's admission that he hit the child with a closed fist. Dr. Trepeta agreed "that an admission from a person admitting to punching [the child] in the abdomen the day before she was pronounced dead at the hospital could be useful in narrowing down the time frame of when an injury occurred..." PCR RT 7/14/2014 at 25-26). Dr. Ophoven, who found no "...evidence that there was a fatal injury that resulted in her deterioration on that day," conceded on cross-examination that "[s]etting aside questions of timing, it 'could have been' a single blow from an adult, a close-fisted blow, could have caused these injuries to the victim." PCR RT 7/14/2014 at 70 ("Yes...I'm not saying it was a single blow. I'm saying it could have been.").

Dr. Keen addressed and discounted Dr. Ophoven's hypotheses of alternative scenarios resulting in death. PCR RT 7/14/2014 at 137-146. Dr. Keen stated, "[The victim] doesn't have another cause of death. This child has some cerebral edema. She has the aspiration changes, but has this bleeding injury is what's causing her death..." PCR RT 7/14/2014 at 169. Critical to his timing of the injury was the child's refusal to eat at the 8 pm lunch hour, which could be bumped "closer to one end or another of [my twelve hour timeframe]" based on the child's lack of appetite earlier in the day and to account for the aspirations. PCR RT 7/14/2014 at 182.

The Court finds that a second pathologist would not have refuted certain key trial evidence: that defendant was alone in the apartment with the two children during the early

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

evening hours; that during that time the defendant struck the victim with a closed fist; that the blow caused a shortness of breath; that the child refused to eat at dinner time, and later appeared somewhat lethargic, to the extent that defendant attempted to confirm that she was still breathing; that the child vomited on defendant and that he mis-attributed the resulting odor to himself when questioned by the child's mother; that an abdominal injury could have contributed to, or resulted in, the child's death; and that defendant either initiated – or continued – a chain of events that culminated in the child's death. Even with a defense pathologist's testimony, the guilty verdict would not change.

The Court finds that given the overwhelming evidence supporting the finding of guilt, additional testimony from a defense pathologist would not have changed the jury's verdict. To find otherwise would be speculation by the Court.

The Court finds that the defendant has not established the second *Strickland* prong and has failed to prove that counsel's deficient performance resulted in prejudice. Thus, the defendant's claim of ineffective assistance of trial counsel at the guilt phase fails.

***II. Guilt Phase Claim Claim 2:
IAC Appellate Counsel-- Lesser-included Instruction***

Defendant claims that appellate counsel's² failure to argue on appeal that the trial court committed reversible error when it denied defendant's request for lesser-included instructions regarding the child abuse charge constituted ineffective assistance. Petition at 26-33. Counsel's trial strategy relied on the ability to show that defendant acted recklessly, rather than intentionally or knowingly. The defendant's trial strategy was to challenge the defendant's state of mind and the defendant's awareness (knowledge) of the injury and the child's need for treatment.

With regard to ineffective assistance of appellate counsel, a colorable claim is one that, if true, might have changed the outcome. *State v. Febles*, 210 Ariz. 589, 595, 115 P.3d 629, 635 (App. 2005). The defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). Appellate counsel is not ineffective for selecting some issues and rejecting others. Once the issues have been narrowed and presented, appellate counsel's waiver of other possible issues binds the defendant. *Id.*

For the reasons stated below, the Court finds that appellate counsel made a reasonable strategic decision not to pursue the claim on appeal.

² Appellate counsel: Kerrie Droban.
Docket Code 019

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

A. Background
1. PCR Hearing

Witnesses at the evidentiary hearing on this issue included Kerrie Droban and Natman Schaye. Appellate counsel, Ms. Droban, testified that she had considered and determined not to appeal the properly-preserved denial of defendant's request for a lesser-included instruction. She provided contemporaneous notes identifying both the issue and her analysis. Mr. Schaye, the defense IAC/*Strickland* expert, testified that "there was certainly evidence in the record from which one could find that [the defendant] recklessly caused the injury and that a lesser-included instruction was supported." RT 7/15/2014 at 82. Specifically, each testified, as follows:

Kerrie Droban was the appointed appellate attorney for defendant. She referred to her written notes, prepared during the course of her evaluation of the trial record. Her notes indicate that she considered and rejected an argument relating to the failure to give a lesser-included instruction. PCR Exhibits 35, 36. RT 7/15/2014 at 56.

She testified to her analysis of the preserved claim. First, case law holds that felony murder does not have a lesser-included offense. Second, her review of the facts of the case did not support either a reckless or negligent lesser-included instruction. The defendant's admission to striking the child with a closed fist suggested that act was not reflexive; telling the child's mother that he, rather than the child, had vomited seemed an attempt to cover up and mitigated against a claim of negligence or recklessness (consciousness of guilt); blaming the girlfriend (inconsistent defenses); and not having to defend against failure to protect/failure to render aid suggested that the defendant's act of hitting the child was not a mistake. RT 7/15/2014 at 56-57.

Although Droban acknowledged that there was not a strategic reason "for not raising the issue, other than what [she had] stated today," she added, "... at the time I reviewed the issue, and I believed I made the right decision...I think this was a difficult case, and I think that...I raised the issues that I believed had merit." RT 7/15/2014 at 62-63.

Natman Schaye works as Senior Trial Counsel for the Arizona Capital Representation Project, and has represented death penalty clients since 1984. Schaye opined as an IAC expert. He disagreed with Droban's analysis and conclusions point-by-point, including noting that she may have left "more than 5,000 words on the table," which the Court finds unpersuasive. (*See* RT 7/15/2014 at 88).

Schaye testified to his belief that the record indicates "...that a lesser-included instruction was supported." RT 7/15/2014 at 82. He also believes that *State v. Wall*, 212 Ariz. 1, 128 P.3d 148 (2006) supports a lesser-included instruction. *Wall* holds that, where supported by

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

the facts, a requested lesser-included instruction is required even where defendant asserts an “all or nothing” defense.

2. Trial Background

The defendant was charged with felony murder, based on the predicate offense of child abuse, and with a separate count of child abuse. Trial counsel sought a lesser-included instruction in connection with the child abuse allegation. In connection with its request, trial counsel made its record:

In a written motion preceding the guilt phase jury instructions and closing argument, trial counsel stated defendant’s position both in writing and in oral argument:

...the defense has taken the stance that the above testimony³ ⁴ and questions by the jury⁵ demonstrate that Joshua may not have acted intentionally or knowingly but recklessly or with criminal negligence. Because of the above evidence, the Arizona Supreme Court requires that the Jury be given the opportunity to decide if Joshua acted intentionally, knowingly, recklessly or with criminal negligence. This is a question for the Jury. It would be fundamental error to prevent the defendant’s ability to present his defense. *Corona, Id.* [*State v. Corona*, 188 Ariz. 85, 89, 932 P.2d 1356, 1360 (App.Div.1 1987).][defendant also cited *State v. Wall*, 212 Ariz. 1, 3, 126 P.3d 148, 150 (2006).

First Supplemental Request for Jury Instructions (filed 3/24/2008) at 5; EXH. AA: RT 3/25/2008 at 3-5.

The State’s Memorandum of Law re: Lesser Included-Offenses of Felony Murder (3/19/2008 at 2-3.) correctly notes that there is no lesser-included “homicide offense of the

³ This Court infers that counsel was referring to trial testimony from Dr. Zhang and Dr. Molina that had the child received medical treatment for her injuries she would have survived; Dr. Sullivan confirmed that blunt force trauma to the abdomen might not result in bruising; Dr. Sullivan testified to the training and experience required to diagnose internal injuries;

⁴ This Court infers that counsel was referring to the defendant’s statements, including that: He had no idea something was ruptured in the child’s stomach; his action was a response to the victim’s hitting her younger sibling; he did not mean to punch her hard enough to kill her; had he intended to kill her he would have fled to Mexico; he tried to administer CPR; what happened was not intentional; he panicked...

⁵ This Court infers that counsel was referring to the following Juror questions: “Even without bruising being present how would a parent in general know that abdominal pain is serious?” and “If the child complains about pain but can’t be specific about the location of the pain do you immediately take the child to the ER?”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

crime of felony murder and failure to instruct thereon does not constitute error.’ *State v. Celaya*, 135 Ariz. 248, 255, 660 P.2d 849 (1983),” and then continues:

...See also *State v. Lopez*, 174 Ariz. 131, 847 P.2d 1078 (1993) (holding that the trial court committed no error in refusing to give lesser included homicide offenses in a felony murder case where the predicate felony was Child Abuse); *State v. Dickens*, 187 Ariz. 1, 926 P.2d 468 (1996) (holding that “this court has long held there are no lesser included offenses to felony murder”); *State v. Lemke*, 213 Ariz. 232, 141 P.3d 407 (2007) (holding that “[t]here are no lesser-included offenses of felony murder).

In its ruling following argument about “lesser included” jury instructions, including as to felony murder and “negligent” or “reckless” child abuse instructions, the trial court ruled:

...The case law is clear. In research that I did I found -- the most recent case I found is *State versus Bocharski*, B-O-C-H-A-R-S-K-I, which is found at 22 P.3d 43, 200 Ariz. 50. It’s a 2001 case which clearly holds, and it is black letter law, that it is improper to instruct the jury on a lesser included on a first degree murder case, that there is no basis for including a lesser included offense. So the current state of the law seems to me is clear that a lesser included offense is not permitted sanctioned by the Court. I’m not going to give it.

And as I indicated before when we talked in chambers, to argue recklessly it seems to me is to allow the defendant to try and take advantage of his own continuing misdeeds by not allowing the child or not bringing the child to the hospital as a basis to somehow try and mitigate his wrongdoing which was according to the evidence in which the jury could find that he was the causal factor in this child’s death by his physical – by hitting the child, by the blunt force trauma which as the medical examiner stated was the cause of death.

It seems to me what you’re trying to argue, as I stated before, Ms. Stevens stated today, is a backdoor effort to try and get in some kind of lesser included offense by using the recklessly instruction which I don’t think applies here. This is not a superseding event cause. That’s – it seems to me also nature of the argument that you’re making. I don’t think that superseding intervening cause will apply in this case because it is his own continuing actions that have resulted in the case being brought before the jury.

I don’t think he can take advantage of his continuing misdeeds to try and backdoor a lesser included offense or a lesser charge and therefore I am denying your proposed jury instruction.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

State's PCR Response, EXH. AA: RT 3/25/2008 at 6-8.

B. Felony Murder Count: Felony murder has no lesser-included offenses

The defendant was charged with felony murder, with child abuse as the predicate offense. He sought a lesser-included offense of homicide. State's Response, PCR EXH. AA: RT 3/25/2008 at 3. The trial court determined that defendant was making a "back door effort" to create a non-existent lesser-included offense of felony murder, citing *State v. Bocharski*, 200 Ariz. 50, 59, 22 P.3d 43, 51 (2001) ("felony murder...has no lesser included offenses").

Initially, the Court notes that child abuse is an appropriate predicate for a felony murder charge:

We emphasize that nothing in this opinion should be read as suggesting that child abuse may not still be a predicate felony for felony murder. If a person intentionally *injures* a child, he is guilty of child abuse under A.R.S. § 13-3623(B)(1); if that injury results in the death of the child it becomes a first degree *felony* murder pursuant to A.R.S. § 13-1105(A)(2). See *State v. Lopez*, 174 Ariz. 131, 141-43, 847 P.2d 1078, 1088-90 (1992), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258 (1993). Although felony murder is first degree murder, it is arrived at differently than premeditated murder. The first degree murder statute, A.R.S. § 13-1105(A)(1), not the child abuse statute, applies when a person intentionally *kills* a child victim.

State v. Styers, 177 Ariz. 104, 110-11, 865 P.2d 765, 771-72 (1993).

The trial court properly instructed the jury on felony murder with a child abuse predicate. For a jury to convict defendant of felony murder, the jury must first determine that defendant committed or attempted to commit child abuse; that defendant, "...under circumstances likely to produce death or serious physical injury, intentionally or knowingly caused [the child] to suffer physical injury." Final Jury Instructions filed 4/2/2008 at 8. The trial court instructed on the definitions of "intentionally" and "knowingly."

As correctly noted by the trial court, in Arizona felony murder has no lesser-included offenses:

It is well established that no lesser included offense to felony murder exists because the *mens rea* necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony. *State v. Arias*, 131 Ariz. at 443-44, 641 P.2d at 1287-88; see *State v. Celaya*, 135 Ariz. at 255, 660 P.2d at 856. Where no lesser included offense exists, it is not error to refuse the instruction. *Spaziano v. Florida*, 468 U.S. at 455, 104 S.Ct. at 3160; *State v. Arias*, 131 Ariz. at 445, 641 P.2d at 1288.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

State v. LaGrand, 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987). See *State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996) (Of course, there is no lesser included offense to felony murder. *State v. Landrigan*, 176 Ariz. 1, 5, 859 P.2d 111, 115 (1993), *cert. denied*, 510 U.S. 927, 114 S.Ct. 334 (1993)). See also *State v. Lopez*, 174 Ariz. 131, 142-43, 847 P.2d 1078, 1089-90 (1992) (convictions for child abuse and felony-murder predicated on child abuse affirmed; State elected to argue felony-murder and to forego premeditated murder argument; child abuse does not merge into homicide predicated on felony murder).

Thus, the trial court did not err when it declined to give a lesser-included instruction as to felony murder, nor was appellate counsel's performance deficient for failing to raise the issue on appeal.

C. Child Abuse Count: Reckless/negligent child abuse instruction⁶

Immediately following the trial court's oral denial of its request, Defendant clarified that, in addition to a lesser included instruction on felony murder, he was also requesting lesser included instructions as to the predicate offense of child abuse; the trial court confirmed its understanding of the additional request and affirmed its denial of the requested "lesser-included" instructions. State's PCR Response, EXH. AA: RT 3/25/2008 at 8.

1. The trial court did not err in failing to give a lesser-included instruction

⁶The trial court instructed:

"Intentionally" or "with intent to" means, with respect to a result or to a conduct described by statute defining an offense, that a person's objective is to cause that result or engage in that conduct.

"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware of believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

Final Jury Instructions [guilt phase] filed 4/2/2008.

The trial court declined to instruct:

RAJI 1.0510(c). "Recklessly" means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that conduct will result in serious physical injury. The risk must be of such nature and degree that disregarding it is a gross deviation from what a reasonable person would do in the situation."

The notes under the RAJI indicate that this instruction is not necessary in cases of manslaughter or second degree murder [lesser-includes of premeditated murder] "because 'recklessly' has been incorporated in the instructions defining those crimes.

RAJI 1.0510(d). "Criminal negligence" means, with respect to a result or a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and justifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

Trial counsel had adopted three-prong trial strategy, leading to his request for the lesser-included instruction. Counsel's trial strategy relied on demonstrating (1) that defendant acted recklessly, rather than intentionally or knowingly. The trial court, when considering how to instruct the jury, considered the evidence presented. Evidence before the trial court included, in addition to defendant's admission that he struck the child in the stomach on this occasion with a closed fist; that the child lost her breath; evidence that he had bruised the child on previous occasions; that he delayed contacting emergency personnel out of fear; and that he did not mean to kill the child. Given the number of injuries previously sustained by the child victim and the time period over which they would have occurred, the record demonstrates that defendant's actions evidenced a pattern of behavior over time, rather than merely "reckless" or "negligent" aberrant behavior on a single occasion. Further, the delay in seeking treatment despite ensuing symptoms (lost her breath; complained of being "tired and tired and tired;" seemed not to be breathing; squeezing stomach led to vomiting) coupled with his seeming-awareness of – but denial of – the child's need for treatment (not calling fire department or going to hospital because he was "scared;" telling mother that he, rather than the child, had vomited) suggest intentional or knowing conduct rather than reckless or negligent behavior.

Counsel's trial strategy also included (2) eliciting testimony about the difficulty in determining the extent of an abdominal injury, such that any failure to immediately seek medical treatment might be viewed by the jury as either "reckless" or "negligent," rather than "intentional" or "knowing." The final, single blow was struck by defendant's closed fist, and whether considered alone or cumulatively with previous injuries inflicted by defendant or others, caused sufficient blunt force trauma that – with the passage of time over the course of that evening and without medical treatment – resulted in the death of the child. Although defendant relied on the apparent difficulty in diagnosing life-threatening abdominal injuries, arguing that difficulty as the reason for any delay in seeking medical treatment from which the child might have recovered, defendant fails to recognize that – by striking the child with a closed fist he inflicted the blunt force trauma that the ME concluded resulted in her death.

Counsel's trial strategy also included (3) shifting the blame to his co-defendant.⁷ Although defendant attempted to shift the blame to another, in doing so he failed to recognize

⁷ **II. Whether the *Enmund-Tison* Finding Was Proper.**

2021 A person convicted of felony murder is only eligible for a death sentence if he killed, attempted to kill, or intended that a killing take place, *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376 (1982), or was a major participant in the felony and acted with reckless disregard for human life. *Tison v. Arizona*, 481 U.S. 137, 157–58, 107 S.Ct. 1676, 1688 (1987). Defendant alleges that Angela Gray had a higher duty of care to Rachel than defendant and, therefore, she was responsible for Rachel's death by not taking Rachel to the hospital. Based on this assertion, he argues he is not responsible for Rachel's death, and, therefore, the *Enmund-Tison* finding must fall. Nothing in law or logic supports the proposition that only one person can bear responsibility for a child's death. Indeed, in this case, the mother was also charged with murder and child abuse, and her trial was severed from

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

that he alone inflicted the blow that led, ultimately, to the child's death. As the trial judge observed, defendant's closed fist began the chain of events that led to the child's death; there was no superseding event – merely the cumulative effect of the blow on a child who had previously sustained injuries at the hands of defendant, and perhaps others.

The trial court concluded that, in addition to attempting to “back-door” a non-existent lesser-include offense to felony murder, defendant was improperly attempting to use his “continuing misdeeds” in failing to obtain medical treatment for injuries he caused to the victim to escape a murder conviction. The trial court determined that the child abuse charge did not warrant a lesser-included instruction based on reckless or negligent acts. *See Exhibit AA.*

A jury instruction must be given upon request if supported by the evidence. *Ariz.R.Crim.P. 23.3; State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994). Defendant claims that his assertion that his action, in striking the child with a closed fist, was reflexive supports his requested “recklessly/criminally negligent” instructions. The Court disagrees. The record demonstrated that the defendant had injured the child on at least three previous occasions; that one incident involved physically shaking the child; that on other occasions his actions resulted in bruising to her face, buttocks and arms. Defendant's actions on the previous occasions suggest that his conduct on this occasion was intentional and/or knowing, even if the result – the child's death – was not.

As determined by the Supreme Court on direct appeal in this defendant's case:

Calling into question defendant's claim that he had acted reflexively rather than intentionally, other acts evidence was presented, showing that shortly before the January 2004 death defendant had violently shaken the child in October 2003; admitted bruising her face and buttocks in November 2003; admitted bruising her face in December 2003;

defendant's. We emphatically reject defendant's suggestion that a parent's guilt exonerates a non-parent, much as did the court of appeals in *Smith*. *See State v. Billy Don Smith*, 188 Ariz. 263, 935 P.2d 841 (App.1996). In *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995), we held that, based on the jury instructions, the jurors had found beyond a reasonable doubt that the defendant killed the victim. *Id.* at 315, 896 P.2d at 855. That finding satisfied *Enmund*. *Id.* Similarly, in this case, the jury's verdict on Count II (direct physical injury to Rachel) and Count V (felony murder) required a finding beyond a reasonable doubt that defendant killed Rachel. The medical examiner testified that Rachel's death was caused by peritonitis after the rupture of her small intestine was left untreated. The jury convicted defendant of causing the rupture of Rachel's small intestine, the specific injury that led to her death (Count II). This supports a death eligible finding under *Enmund*. In addition, defendant is also clearly death eligible under *Tison*, as he was not only a major participant in the underlying felonies, but was the sole participant in the assault of Rachel, and he obviously acted with reckless disregard toward human life.

State v. Jones, 188 Ariz. 388, 399, 937 P.2d 310, 321 (1997).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

and admitted bruising her arms in the weeks before her death. *Id.* This established his mental state, and also served to rebut his claim that he did not intend to hurt the child but had, instead, hit her as a “reflex,” as well as to rebut his claim that her mother caused the injuries. *Villalobos*, 225 Ariz. at 80, 235 P.3d at 233; *see* Appendix F: Interview of defendant, at 143-144, 147, 148, 157.

The evidence adduced at trial supported defendant’s statement that he had hit the child with a closed fist. Defendant does not deny inflicting the final blow, which the State’s expert characterized as the fatal blow. Nor does defendant deny failing to secure treatment for the child; treatment which, according to the expert and the examining doctor at the hospital, had it been secured, likely would have prevented the child’s death.

We review a court’s ruling on a jury instruction for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616–17 (2009). The court should reject instructions that misstate the law or would be misleading or confusing to the jury; “the test is whether the instructions adequately set forth the law applicable to the case.” *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009–10 (1998). Further, “in evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel.” *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App.2003).

State v. Lizardi, 234 Ariz. 501, 503, 323 P.3d 1152, 1154 (Ct. App.1 2014).

A lesser-included offense instruction is not required in every case; it is appropriate only if the facts support giving the instruction. *See State v. Wall*, 212 Ariz. 1, 4, ¶ 17, 126 P.3d 148, 151 (2006). To determine whether sufficient evidence existed to require a lesser-included offense instruction, the court must examine “whether the jury could rationally fail to find the distinguishing element of the greater offense.” *State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (quoting *State v. Noriega*, 142 Ariz. 474, 481, 690 P.2d 775, 782 (1984), *overruled on other grounds*, *State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990)). Thus, a lesser-included offense instruction is required if the jury could “find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense.” *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151 (citing *State v. Caldera*, 141 Ariz. 634, 636–37, 688 P.2d 642, 644–45 (1984)).

State v. Bearup, 221 Ariz. 163, 168, 211 P.3d 684, 689 (2009).

The trial court is in the best position to determine whether evidence supports giving of a lesser included instruction. The trial court determined that the evidence presented did not

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

support a lesser-included instruction. The trial court instructed, and the jury found, first degree felony murder and child abuse.⁸ There is no indication that the jury failed to follow the court's instructions in reaching its verdict. The jury, by convicting defendant of felony murder, necessarily found that Defendant's action was not merely reckless, nor was it negligent.⁹¹⁰ The jury, by its verdict convicting defendant of felony murder with a predicate offense of child abuse, concluded that Defendant's course of conduct and actions were intentional or knowing.

The trial court rested its decision on case law holding that felony murder has no lesser-included offenses coupled with the lack of evidence for a finding that defendant had acted in a reckless or negligent manner. The Arizona Supreme Court, had it been asked to consider whether the trial court's denial of defendant's request for lesser included instruction was error, would have reviewed trial court's ruling for an abuse of discretion; the Supreme Court would have concluded that the trial court did not abuse its discretion. Thus, the issue was meritless.

Failure to raise a meritless issue on appeal does not constitute deficient performance by appellate counsel. Thus, the trial court did not err when it declined to give a lesser-included instruction as to the child abuse count, nor was appellate counsel's performance deficient for failing to raise the issue on appeal.

⁸ First Degree Felony Murder

The crime of first degree felony murder requires proof that:

The defendant committed or attempted to commit child abuse and in the course and furtherance of the offense of child abuse caused the death of Ashley Molina.

Child Abuse

The crime of child abuse requires proof that the defendant, under circumstances likely to produce death or serious physical injury, intentionally or knowingly caused Ashley Molina to suffer physical injury.

Final Jury Instructions filed 4/2/2008 at 7-8.

⁹ A defendant may not be sentenced to death under the Eighth Amendment unless he "kill[s], attempt[s] to kill, or intend[s] that a killing will take place or that lethal force will be employed," *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368 (1982), or is a major participant in a crime and acts with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676 (1987). The trial court in this case did not ask the jury to make an *Enmund/Tison* finding. See A.R.S. § 13-752(P) (2010) (requiring jury to make all factual determinations required by the "Constitution of the United States or this state to impose a death penalty"). Villalobos did not request an *Enmund/Tison* finding below, nor does he raise this as an issue on appeal. In any event, the evidence below overwhelmingly established that Villalobos was the actual killer. *State v. Villalobos*, 225 Ariz. 74, 83 FN5, 235 P.3d 227, 236 (2010).

¹⁰ Homicide is murder if the death results from the perpetration or attempted perpetration of one of the specific offenses listed in A.R.S. s 13—452. The specific intent for the felony, in this instance burglary, supplies the necessary element of malice or premeditation. *State v. Howes*, 109 Ariz. 255, 508 P.2d 331 (1973). *State v. Ferrari*, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

2. Even were it deemed error for the trial court to decline to give a lesser included instruction, defendant suffered no prejudice.

Further, the “reckless/negligent” jury instruction would not have changed the result. Three additional jury instructions, neither requested nor given but which would have been proper had the trial court permitted a “negligent/reckless” instruction, support this conclusion.

The instructions would have responded to defendant’s three-pronged defense and clarified (1) what the jury could consider in ascertaining defendant’s state of mind; (2) that any pre-existing injuries would not serve to diminish defendant’s criminal responsibility; and (3) that to find defendant not guilty the jury would have to determine that the other party’s act was the sole proximate cause of the child’s death. *See* RAJI Standard Criminal 17 – Voluntary act and *State v. Lara*, 183 Ariz. 233, 234-35, 902 P.2d 1337, 1338-39 (1995); RAJI 2.03.02 – Causation Instruction – Pre-existing Physical Condition (“When a person causes injury to another, the consequences are not excused, nor is the criminal responsibility for the resulting death lessened, by the pre-existing condition of the person killed.”); and RAJI 2.03.03 – Causation (Multiple Actors) (“The unlawful act of two or more people may combine to cause the death of another. If the unlawful act of the other person was the sole proximate cause of death, the defendant’s conduct was not a proximate cause of the death. If you find that the defendant’s conduct was not a proximate cause of the death, you must find the defendant not guilty”).

Under the facts of this case, where an already-injured child died within hours of being struck by a blow inflicted by defendant who was the only adult present – even if the new injury merely exacerbated previously-sustained injuries inflicted by another – the result of the trial would not have changed had the requested lesser-included instructions been given. Thus, there is no prejudice.

The Court finds that had the Supreme Court been asked to review the trial court’s denial of a lesser-included instruction, it would have reviewed the decision for an abuse of discretion and would have upheld the denial.

The Court concludes that appellate counsel Droban did not commit *Strickland* error in failing to raise the “lesser-included” issue either as to felony murder count or the substantive child abuse count.

Accordingly, based on the above,

IT IS THEREFORE ORDERED denying the defendant’s Petition for Post-Conviction Relief as to both guilt phase claims, Claims I and II.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

IT IS FURTHER ORDERED affirming the Court's Order dated February 28, 2014, in which the defendant was granted a new penalty phase trial.

The Court will set an Informal Conference in order to expedite the proceedings to discuss [any post-trial motions; assignment and qualification of penalty phase counsel; setting the penalty phase for trial; who will handle the penalty phase retrial] for 1/8/2015 at 10:30 a.m. before Judge Joseph Welty, which the defendant need not be present. Rule 32.7. Arizona Rules of Criminal Procedure.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.